U.S. Department of Labor

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Issue Date: 28 November 2006

CASE NO.: 2002-LHC-2722

OWCP NO.: 07-149365

IN THE MATTER OF:

K. H.[1]
Claimant

v.

GULF COAST FABRICATIONS

Employer

and

RELIANCE NATIONAL INSURANCE COMPANY
c/o MISSISSIPPI INSURANCE GUARANTY ASSOCIATION

Carrier

APPEARANCES:

TOMMY DULIN, ESQ.
For The Claimant

DONALD P. MOORE, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER ON REMAND

On January 25, 2006, the Benefits Review Board (herein the Board) issued a Decision and Order remanding this matter for reconsideration consistent with its opinion.

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

Procedural Background

This case has been the subject of a Decision and Order, Decision and Order on Section 22 Modification and a supplemental Decision and Order Awarding Attorney's Fee.

The initial Decision and Order Awarding Benefits issued on January 14, 2004. The parties stipulated that Claimant suffered a compensable right knee injury on June 16, 1998. On February 2, 1999, Dr. Flores removed a bursa from Claimant's knee and he unsuccessfully returned to work in August 1999. Claimant was referred to work-hardening for his knee injury when he sustained a back injury on August 17, 1999. Claimant alleged that he also sustained a fall at church on April 28, 2001, due to instability to his work-related right knee injury which resulted in an injury to his right hip and left ankle/foot.

The undersigned found Claimant's back injury while undergoing work-hardening was also compensable, but was only temporarily disabling until June 15, 2000. It was determined that Claimant had reached maximum medical improvement on December 12, 1999, for his right knee injury. It was also concluded that Claimant had failed to establish his right hip and left ankle/foot injuries were related to his June 1998 work injury.

The Board affirmed my findings that Claimant's hip and left ankle/foot injuries are not related to his work-related right knee injury and that Claimant's mid-back injury on August 17, 1999, while undergoing work-hardening, was a consequence of his work-related June 1998 right knee injury. The Board also affirmed my finding that Claimant is unable to return to his usual employment as an electrician and is totally disabled. My denial of Employer/Carrier's request for Section 8(f) relief was also affirmed.

Employer/Carrier appealed the decision and Claimant cross-appealed. Both parties filed motions for modification. In March 2004, the Board remanded the case for modification proceedings. On December 23, 2004, a Decision and Order on Section 22 Modification issued. It was determined that Employer/Carrier was not entitled to modification since evidence of suitable alternative employment could have been presented at the initial hearing and was not and, therefore, no change in Claimant's economic condition was established. It was also determined that Claimant did not establish a mistake of fact

that his hip and left ankle/foot injuries were related to his initial work injury. The undersigned found that Claimant had established a psychological injury related to his work injuries; was entitled to medical treatment for his "work-related **lower** back injury;" and had not established that a diagnostic arthroscopy of his right knee was reasonable and necessary.

Employer/Carrier appealed and Claimant cross-appealed the decision on modification. The Decision and Order on Modification was vacated insofar as the undersigned found that Claimant sustained a work-related psychological injury and denied Employer/Carrier's petition for modification. The case was remanded for reconsideration of the work-relatedness of Claimant's psychological condition and the Employer/Carrier's evidence of suitable alternative employment.

More specifically, the Board affirmed my findings that Claimant did not establish a mistake of fact regarding the cause of his hip and left ankle/foot injuries resulting from the fall at church; that he failed to establish he was prevented from performing his usual employment by his temporary psychological condition; and the denial of a diagnostic arthroscopy of the right knee as medically necessary.

The Board vacated my decision on modification that Claimant established a work-related psychological injury. In the initial decision, it was determined that Claimant had sustained a work-related "**mid-back**" injury. On modification, the undersigned found that Claimant's "lower back" injury and prescription of Lortab-10 for his lower back pain contributed to his psychological condition. It was also concluded that Drs. Koch and Maggio indicated Claimant suffered from a pain disorder related, in part, "to his lower back injury, and possibly to [his] knee injury." Since there were no findings supporting a conclusion that Claimant sustained a work-related **lower** back injury, the Board vacated my finding that Claimant established a work-related psychological injury as well as my finding that Claimant is entitled to medical treatment for his work-related "lower back injury." On remand, the Board directed that the following issues be addressed: the type of back injury Claimant sustained in "May 1999;" whether he sustained a "lower back injury;" if so, whether Claimant is entitled to medical treatment therefor and its relationship to his psychological condition.

Because of the inconsistencies between the original and modification decisions regarding the back injury, the Board also directed that I consider Claimant's contention that Dr. Jackson's trigger point injections for his mid-back pain were reasonable and necessary for his work-hardening back injury.

The Board concluded that the undersigned erred by denying Employer/Carrier's modification request for failing to present evidence of suitable alternative employment or requesting a post-hearing opportunity to do so. The Board vacated my denial of Employer/Carrier's motion for modification. The Board also found that I erred in rejecting Employer/Carrier's evidence of suitable alternative employment. In so concluding, the Board directed that I **not** consider the effects of any intervening condition to determine Claimant's ability to work, "as only disability attributable to the work injury, or factors related to conditions pre-dating the injury, is relevant." Thus, it was error to consider disability attributable to Claimant's non work-related fall at church in April 2001 in assessing Claimant's physical restrictions.

The Board directed that I address Employer/Carrier's contention that Claimant's reliance on pain medication and his psychological and lower back conditions are intervening injuries that should not be considered in determining Claimant's ability to perform the jobs identified in Employer/Carrier's labor market survey. Moreover, should I find that Claimant has a work-related psychological injury, I must make findings of fact on the extent of Claimant's temporary psychological condition and its affect on his ability to work.

Both parties appealed my Supplemental Decision and Order Awarding Attorney's Fee. The Board affirmed the award at an hourly rate of $185.00 and the reduction of the number of hours based on Claimant's partial success. In view of the issues on remand, the Board noted that reconsideration of the attorney's fee award may be warranted in view of any increase or decrease in the award of benefits on remand.

The parties agreed that these issues could be resolved without an additional formal hearing and submitted supplemental medical and vocational evidence which have been received into the record as 2CX1-7 and 2EX1-3.[2] Post-hearing briefs were

[2] The current exhibits are identified with a prefix of "2" designating the exhibits as second modification exhibits to

received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, the direction of the Board and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. ISSUES

The issues presented on Board remand of the petitions for modification are:

1. What type of back injury Claimant sustained during work-hardening.

2. Whether Dr. Jackson's trigger point injections for Claimant's mid-back were reasonable and necessary for his injury sustained during work-hardening.

3. Whether Claimant is entitled to medical treatment for a low back injury.

4. Whether Claimant established a work-related psychological injury and, if so, whether specific limitations of his psychological condition affect his ability to work.

5. Whether the work-hardening mid-back injury has any relationship to Claimant's psychological condition.

6. Whether Claimant's reliance on pain medications, psychological injury and lower back condition are intervening conditions which should be considered in a vocational assessment.

7. What restrictions are attributable to Claimant's work injuries and any pre-existing conditions.

8. Whether Employer/Carrier established suitable alternative employment within Claimant's restrictions attributable to his work injury and pre-existing conditions.

9. The reasonableness of awarded attorney's fees.

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distinguish them from the first modification and initial hearing exhibits.

II. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. Claimant's Work-Hardening Back Injury

In my original Decision it was noted that Dr. Jackson opined Claimant "had either a torn muscle or ligament in the lower thoracic/upper lumbar region around T-11 as a result of the lifting injury sustained in the work hardening program." (D & O, p. 30). He recommended a trigger point deactivation program to lessen the discomfort and improve function. The trigger point injections were accomplished on December 7, 2000, December 13, 2000 and January 8, 2001. (D & O, pp. 30-31).

On February 9, 2006, Dr. Jackson prepared a follow-up report at the behest of Counsel for Claimant. He reiterated that Claimant had suffered a **mid**-back ligamentous injury during work hardening at the T10-11 level which caused significant pain. He added there was **no exacerbation** of Claimant's **pre-existing lower** lumbar pain since the injury was to the upper lumbar to lower thoracic area. He opined that permanent restrictions are likely since Claimant continued to be symptomatic during his treatment. He would extend a four to five percent impairment related to loss of range of motion and continuing paravertebral tautness and pain. He now suggests, contrary to his earlier opinion, permanent restrictions of no more than a light level of work, lifting 30 pounds on occasion, 20 pounds with any frequency and avoiding working in a bent or stooped-over position. (2CX-1). These restrictions are due to "a multitude of reasons including this additional upper low back or lower mid back pain but also due to the pre-existing problems in the lumbar area and the injury to the knee." No further delineation or clarification was offered.

Dr. Jackson further noted that the pre-existing back problems were to the lower lumbar area whereas the new symptoms reported by Claimant "were in the upper lumbar lower thoracic area and the two clearly are **unrelated**." The **mid**-back injury was directly due to the lifting program involved with the work hardening program. (2CX-1, p. 2).

On June 3, 2006, Dr. Terry C. Smith, a neurosurgeon, rendered a report at the request of Employer/Carrier after reviewing "some medical records." He opined that "an August 30, 1999 back injury during work hardening was a temporary injury." He concluded that Claimant should have been able to return to gainful employment based on the restrictions of an FCE completed on September 3, 1999. He noted the restrictions were due to Claimant's knee injury not to his back injury. Thus, he assigned no restrictions to Claimant based on his temporary mid-

back injury. He further opined the thoracic trigger point injections administered to Claimant were related to his work hardening back injury and not to any pre-existing lumbar problems. He opined that he would not anticipate any other medical treatment to Claimant's thoracic area. (EX-1).

Having reviewed the original Decision and Order and the Decision on Modification, and notwithstanding the inconsistencies regarding the back injury, I find that Claimant suffered a **mid**-back injury on August 17, 1999. Drs. Graham and Jackson agree that Claimant suffered a ligamentous injury to the thoracic area which resulted in only temporary restrictions of four months with no assignable impairment. Dr. Jackson opined that the only impairment was based on pre-existing back conditions not to Claimant's current trauma and that Claimant could return to light to light sedentary work. Dr. Flores concurred with the opinion of Dr. Jackson. Dr. Jackson did not assign any restrictions related to Claimant's temporary mid-back injury. Dr. Graham's temporary restrictions consisted of no lifting over 20 pounds, limited overhead work and limited climbing of scaffolds, ropes and poles. I reaffirm my finding that Claimant reached MMI on June 15, 2000, for his temporary mid-back injury.

B. The mid-back trigger point injections

I affirm my findings in the original Decision that Claimant suffered only a temporary disability to his back as a result of his work hardening injury and that he reached MMI by June 15, 2000, consistent with the opinion of Drs. Graham and Jackson. I further find, based on the supplemented record and a review of the hearing records, that the trigger point injections administered by Dr. Jackson were to alleviate Claimant's **mid**-back pain and were reasonable and necessary to treat Claimant's temporary mid-back injury. There is no record evidence to the contrary. Accordingly, Employer/Carrier are responsible for the medical treatment provided in associated with the trigger point injections administered by Dr. Jackson.

C. Claimant's medical treatment for his "low back injury"

Claimant submitted an MRI report of the lumbar spine dated June 8, 2006, ordered by Dr. Whitecloud. Claimant treated with Dr. Whitecloud for "low back pain," based on a history from "1985 and before." Claimant's pre-existing lumbar problems resulted in two surgeries at the L4-5 level. The results of the MRI disclosed degenerative disc disease at the L5-S1 level with

minor encroachment at that level and mild spinal canal stenosis at the L3-4 level. (2CX-3). As noted in the original Decision, Dr. Whitecloud reported treating Claimant for a chief complaint of "LBP" with a date of onset of June '98. (CX-13, p. 1). Dr. Whitecloud prescribed Lortab-10 pain medication for Claimant's lower back pain.

In his supplemental report of February 9, 2006, Dr. Jackson observes that Claimant's pre-existing back problems were in the lower lumbar area, whereas his work-related back injury is in the upper lumbar-lower thoracic area. He opined that there was no exacerbation of Claimant's pre-existing lower lumbar pain from the work hardening trauma. (D & O, p. 17).

I find that Claimant's ongoing treatment for lower back pain with Dr. Whitecloud is **not** related to his work-hardening injury and is **not** compensable. Therefore, Employer/Carrier are not responsible for any medical treatment provided by Dr. Whitecloud for Claimant's low back pain.

D. Whether Claimant established a work-related psychological injury and, if so, whether specific limitations of his psychological condition affect his ability to work

In the Decision on Modification, I found, after weighing all the evidence of record, that Claimant had established a work-related psychological injury because he suffered from a pain disorder related, in part, to his continuing **low** back injury from work hardening (and the side effects of pain medication for his low back pain) "and possibly to his knee injury." Because I had inconsistently also found Claimant suffered a work-related **mid**-back injury during work hardening, the Board vacated my findings. The Board correctly concluded that my finding of a nexus between Claimant's work injury and his alleged psychological injury was lacking and therefore erroneous. The Board remanded for further clarification.

For reasons explicated above, I have determined that Claimant suffered a **mid**-back injury during work hardening and **not** a low back injury. The pain medications for which Dr. Whitecloud has provided ongoing prescriptions of Lortab-10 were to alleviate Claimant's low back pain. Thus, contrary to my finding on modification, any psychological side effects from Claimant's use of 200 Lortabs per month for his low back pain would not be related to his mid-back work hardening injury and, therefore, is not work-related.

On August 10, 2006, Daniel Koch, Ph.D., rendered an updated report in this matter. Aside from an academic dispute with Dr. Maggio about the DSM-IV standards for an adjustment disorder, depressive disorder and pain disorder, Dr. Koch offers no opinion about the cause of Claimant's alleged psychological conditions. He noted that Claimant's Minnesota Multiphasic Personality Inventory test results indicate major depression "with though (sic) disorder," and that he suffers a moderate neuropsychological impairment as determined by the Halstead Reitan Battery for organic mental disorders. Dr. Koch also concluded that Claimant is functionally illiterate, suffered an Attention Deficit Disorder (ADD) in school and did not attain literacy. (2CX-4).

On September 6, 2006, Dr. Maggio, who is board-certified in Psychiatry and Forensic Psychiatry, also submitted an updated report after reviewing Dr. Koch's latest report of August 10, 2006. Dr. Maggio agreed with Dr. Koch that Claimant's adjustment disorder was chronic in nature but temporary, awaiting the resolution of existing stressors. He disagreed with Dr. Koch's opinion that Claimant suffered from major depression based upon a lack of diagnoses from treating physicians and evaluative mental health professionals, Claimant's denial of depressive symptoms and his evaluation of Claimant. Dr. Maggio noted that Claimant's complaints about neuropathic pain and sexual dysfunction have emerged since his knee gave way and he underwent hip and ankle surgeries in 2001. As a result of his complaints, Claimant was prescribed Lortab-10, effective for acute pain, but which can cause depression with increased dosages. (2EX-2).

Dr. Maggio disputes Dr. Koch's opinion that Claimant is permanently and totally disabled because of reported cognitive limitations and organic brain disease based upon psychological testing, because of a lack of expressed or observed symptoms. Contrary to Dr. Koch, Dr. Maggio found Claimant to be of normal intelligence and not functionally illiterate, with good recent and past memory and no sign of thought disorder. He opined, to a reasonable degree of medical certainty, that Claimant has a temporary mental disorder which is not disabling. However, he offers no opinion about causation of the temporary psychological condition. He further opined Claimant does not have any psychiatric or psychological disability that is related to his work-related injury. Although Claimant had a history of pre-existing problems with ADD as a child and is reportedly

functionally illiterate, Dr. Maggio opined these conditions existed before his work-related injury and did not impact his ability to work. (2EX-2, p. 5).

The Gulf Coast Mental Health hand-written records submitted for the period after the modification hearing reflect continuing counseling with Claimant, to the extent such records are legible and readable. (2CX-5). The progress notes show Claimant reiterated continuing health difficulties and physical pain, frustration with the legal system and his inability to obtain health care. (2CX-5, p. 15). On April 27, 2005, Claimant reported a "history of depression on and off since having an injury in 1998." (2CX-5, p. 16).

On November 17, 2005, Claimant was diagnosed with a Depressive Disorder NOS based on a history of physical injuries, surgeries, difficulty coping with daily pain, frustrations and anger. He had increased stressors since Hurricane Katrina with his home being flooded. (2CX-5, p. 22). He was assigned a GAF of 58 on Axis V, a "Global Assessment of Functioning Scale," which reflects "moderate symptoms," that are not otherwise explicated. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, page 32 (1994). On November 17 and 29, 2006, Claimant was assessed with "normal or above level of intellectual functioning," with "no impairment, normal thought process." (2CX-5, pp. 29, 31).

Considering the foregoing, I reaffirm my finding and conclusion that Claimant's psychological condition is due, in part, to his 1998 work-related knee injury and Claimant's residual pain. Claimant attributes his "depression" with an onset since his knee injury in 1998. There is no evidence of record which contradicts this finding.

However, as previously noted, I do not find Claimant's continuing low back problems to be work-related nor do I find his continuing use of pain medications, Lortab-10 and any side-effects caused by its use, to be work-related. Although these conditions may contribute to Claimant's psychological condition, they are not work-related causes. To the extent Claimant suffered mid-back pain which required trigger point injections, his pain was work-related but temporary in nature. His mid-back injury resolved without surgery and no restrictions or impairment rating was assigned.

Other physical conditions which may contribute to Claimant's psychological condition include his injuries to his hip and left foot/ankle in April 2001 which have been found not to be work-related. He was diagnosed with a fractured pelvis and left foot and a dislocated hip, requiring multiple surgeries. Thereafter, Claimant developed urinary problems and erectile dysfunction, as well as complications with his sciatic nerve and low back, all of which have been found to be unrelated to his work injury, and, accordingly, are not contributory to his psychological condition from a compensation perspective.

In my Decision on Modification, I determined that no work restrictions had been assigned to Claimant based **solely** upon his psychological injury and that he was not disabled by such condition. Likewise, the supplemental reports of record on remand from Drs. Koch and Maggio and Gulf Coast Mental Health are devoid of any restrictions assigned to Claimant solely for his psychological condition. I further find the record does not support a conclusion that Claimant's cognitive abilities and literacy are vocationally impaired. Both Dr. Maggio and the Gulf Coast Mental Health professionals regard Claimant as having normal or above normal intelligence and normal thought processes. Functionally, Claimant engaged in gainful employment before his work injury, attended vocational training as an electrician, actively participated in the administration of his church and Port Commission meetings, all of which mitigate against an argument that Claimant is illiterate or vocationally non-functional.

Accordingly, I find and conclude that there are no specific limitations solely because of his psychological condition which affect Claimant's ability to work. Moreover, it is noted that the Board affirm my finding that Claimant failed to establish he was prevented from performing his usual employment by his temporary psychological condition.

E. Whether Claimant's mid-back injury has any relationship to his psychological condition

Having found that Claimant suffered a mid-back injury on August 17, 1999, I find that the credible evidence of record supports a conclusion that the injury was temporary, with no assignable restrictions or impairment rating. Drs. Jackson and Graham were in agreement initially and so opined. Although Dr. Jackson subsequently contradicted his earlier opinion, I discard

his most recent opinion since he has offered no reasoned basis for recanting his opinion. Dr. Smith's opinion buttresses the determination that the mid-back injury was temporary and that no restrictions were assignable.

I have also found that Claimant reached MMI on June 15, 2000, for his mid-back injury. During the interim, I found, based on Dr. Graham's temporary restrictions, that Claimant should not lift over 20 pounds, work overhead or climb scaffolds, ropes or poles. The record reveals that Claimant received trigger point injections for his mid-back pain through January 8, 2001. The record is devoid of any treatment thereafter for his mid-back injury.

The record is also silent regarding the physical complaints and daily pain about which Claimant complained to mental health professionals. There is no persuasive record evidence that Claimant made any complaints after January 2001 about continuing **mid**-back problems.

Claimant did not seek psychological assistance until November 11, 2003. There is no specific complaint by Claimant set forth in progress notes about his mid-back injury causing any pain or problems. The stressors noted are "numerous surgeries including 2 back surgeries, knee surgery, foot, and hip surgery." His pain medication associated with his back complaints were prescribed by Dr. Whitecloud, which were provided for his **low** back pain. (2CX-5, pp. 1-2).

Accordingly, in view of the foregoing, I find that there is no relationship between Claimant's work hardening mid-back injury of August 17, 1999, and his subsequent psychological condition for which he sought counseling in November 2003. The record does not support a finding that Claimant's mid-back complaints were presented in the litany of "stressors" which formed the bases of his diagnosis. Nor is there any record evidence that Claimant had any residual limitations or restrictions from his mid-back injury after June 2000 which precluded his gainful employment.

F. Whether Claimant's reliance on pain medications, psychological injury and lower back condition are intervening conditions which should be considered in a vocational assessment

The Board held that I must not consider the effects of any intervening condition to determine Claimant's ability to work as only disability attributable to the work injury, or factors related to conditions pre-dating the injury are relevant. Leach v. Thompson's Dairy, Inc., 13 BRBS 231, 234 (1981). Thus, if a claimant has a pre-existing condition which is accelerated, aggravated or which manifests itself **as a result of a work-related injury**, in a claim based on the work-related injury all of the resulting disability is compensable. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967); Independent Stevedore Co. V. O'Leary, 357 F.2d 812 (9th Cir. 1966). But, if a claimant has a subsequent injury which is not work-related, then in a claim based on the work-related injury only disability due to the work-related injury is compensable. See Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456 (9th Cir. 1954).

Claimant suffered a right knee injury and a temporary mid-back injury. I have found that Claimant's knee injury contributed, in part, to his psychological condition. The record evidence does not establish that Claimant's pre-existing low back condition was accelerated, aggravated or made manifest by Claimant's knee and mid-back work injuries. Therefore, his low back condition for which he sought treatment from Dr. Whitecloud is not work-related, nor compensable and is an intervening condition which should not be considered in a vocational assessment. Similarly, the pain medications prescribed by Dr. Whitecloud for Claimant, which produced side effects, have been found to be unrelated to his work injuries and are considered an intervening condition which will not be considered in a vocational assessment.

I find that Claimant's psychological condition manifested itself, in part, as a result of his knee injury and its residual treatment, including surgery. Since it is related to his work injury, his psychological condition is not considered an intervening condition and will be considered in a vocational assessment to the extent any limitations related thereto are imposed on Claimant's ability to work.

G. Restrictions attributable to Claimant's work injuries and pre-existing conditions

Claimant has established that he sustained two work-related physical injuries and a residual psychological injury. On June 16, 1998, he injured his right knee and on August 17, 1999, he suffered a mid-back injury while performing work hardening. He

was assigned maximum medical improvement for his right knee on December 12, 1999. His mid-back injury was temporarily disabling until June 15, 2000.

I have previously determined that Claimant has permanent work restrictions from his knee injury and resulting surgery of no heavy lifting, no crawling and no ladder climbing. The Board affirmed my finding that Claimant is unable to return to his former employment as an electrician, which was a heavy demand job. Thus, Claimant established a **prima facie** case of total disability.

I have found that Claimant's mid-back injury was temporary in nature with temporary restrictions assigned by Dr. Graham of no lifting over 20 pounds, limited overhead work and limited climbing of scaffolds, ropes and poles through June 15, 2000, when Claimant reached MMI. On June 15, 2000, Dr. Jackson assigned work restrictions for Claimant's mid-back injury limiting him to light or light-sedentary work involving no bending, stooping over or lifting over 30 pounds. I attribute no probative weight to Dr. Jackson's assignment of work restrictions in his 2006 report since such restrictions are attributable to "a multitude of reasons" including Claimant's work-related mid-back as well as his non-work-related low back conditions.

As discussed above, no work limitations or restrictions have been assigned by any treating or consultative mental health professional regarding Claimant's psychological condition.

There are no pre-existing conditions which were accelerated, aggravated or made manifest by Claimant's knee or mid-back injury. Thus, there is no vocational impact attributable to any pre-existing conditions.

H. Whether Employer/Carrier established suitable alternative employment within Claimant's restrictions attributable to his work injury and pre-existing conditions

If the claimant is successful in establishing a **prima facie** case of total disability, i.e., that he is unable to return to his former electrician job, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997).

Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

It is well-settled that a worker entitled to permanent partial disability for an injury arising under the schedule provisions of the Act may be entitled to greater compensation under Sections 8(a) and (b) by showing that he is totally disabled. Potomac Electric Power Co. v. Director, OWCP [PEPCO], 449 U.S. 268, 277, 14 BRBS 363, 366-67 (1980); Davenport v. Daytona Marine & Boat Works, 16 BRBS 196, 199 (1984). If the worker is not totally disabled, he is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

As noted above, the only restrictions placed upon Claimant which must be considered for vocational purposes are those related to his knee injury involving no heavy lifting, no crawling and no ladder climbing. Light to light-sedentary restrictions assigned as a result of Claimant's mid-back injury were temporary and no longer precluded employment after June 15, 2000. There are no limitations or restrictions assigned solely for Claimant's psychological condition. There were no limitations placed on Claimant regarding his capacity to perform full-time employment. Thus, Employer/Carrier had the burden of establishing suitable alternative employment within the Claimant's physical capabilities given his knee restrictions.

Employer/Carrier's vocational counselor, Joe Walker, performed labor market surveys on February 9, 2004 and April 30, 2004. The Decision on Modification at pages 7-14 sets forth a

summary of three assumptions upon which Mr. Walker based his vocational opinions. I find the limitations and restrictions assumed in Assumption No. I comport with Claimant's vocational ability and that the ten jobs identified in the February 9, 2004 labor market survey constitute suitable alternative employment since the precise nature and terms of each prospective job is set forth and conform to Claimant's physical and mental capabilities. In his April 24, 2006 updated report, Mr. Walker opined that the foregoing jobs fall within the classification of light or sedentary jobs. (2EX-3). Five of the jobs offered full-time employment of 40 hours per week with an average wage of $6.76 per hour. The remaining five jobs offered employment from 15 hours per week to 30 hours at an average of $5.44 per hour.

Mr. Walker also conducted a labor market survey on April 30, 2004, which resulted in Assumption No. 2 incorporating limitations and restrictions from Assumption No. 1 with limitations that are associated with non-work injuries and/or pre-existing conditions which have no relationship to Claimant's work-related disabilities. Accordingly, I find the seven jobs set forth in Assumption No. 2 are not relevant for consideration. Nevertheless, I find that each of the seven jobs would be appropriate for Claimant given the additional restrictions assumed at an average wage of $6.25 for full-time employment.

Six additional jobs were identified in the April 30, 2004 labor market survey, however only the part-time cashier at Movie Gallery, the security guard and hotel desk clerk positions at the Imperial Palace Casino and the cashier-checker or customer service representative jobs at Wal-Mart comport with the restrictions of Assumption No. 1 and are considered suitable alternative employment. The average wage for the four jobs was $7.83 for full-time positions and $5.75 per hour for part-time work. The front desk clerk and the table games dealer positions at Treasure Bay Casino are not described with the precise nature and terms of employment to enable an analysis compared with Claimant's physical and mental capabilities and therefore are not considered suitable alternative employment.

I find and conclude that Mr. Walker's Assumption No. 3 should be rejected since it considers work as well as non-work disabilities and restrictions.

Ms. Hutchins prepared an updated report dated September 7, 2006, which concludes Claimant is unemployable because of his "multiple orthopedic problems," "functional illiteracy, low intellectual ability, "unstable mood and frequent outbursts of anger and frustration," and "drowsiness, fatigue and mood changes" which may be due to side effects of his medications or any combination of the above. Ms. Hutchins opined that Claimant was not employable at any level of work activity and her findings were consistent with Mr. Walker's Assumption No. 3 and the Fully Favorable Social Security Decision of an Administrative Law Judge.[3] For reasons discussed above, I reject Ms. Hutchins's opinion since she has considered limitations unrelated to Claimant's work injuries and pre-existing conditions.

Considering the foregoing, I find Employer/Carrier established suitable alternative employment compatible with Claimant's restrictions attributable to his work injuries and pre-existing conditions effective February 9, 2004. Thus, I find that Claimant was permanently partially disabled after February 9, 2004, with a wage earning capacity of $6.25 to $6.76 per hour for full time work and a wage earning capacity of $7.83 after April 30, 2004.

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[3] On April 7, 2006, Claimant received a Fully Favorable Decision from an Administrative Law Judge with the Social Security Administration. (2CX-2). I do not accord any persuasive or probative value to the decision since the legal principles or standards of proof are not the same as the standard of proof in the instant case. Although res judicata applies to some administrative proceedings, the criteria established by the U. S. Supreme Court requires: the agency act in a judicial capacity; factual disputes resolved must have been relevant to the issues before the agency; both parties must have had a full and fair opportunity to argue their version of the facts; and both parties must have had an opportunity to seek court review of any adverse findings. United States v. Utah Construction and Mining Company, 384 U.S. 394, 422 (1966). It is clear that the parties to the present proceeding differ from those before the Social Security Administration and that Employer/Carrier did not have a full and fair opportunity to litigate issues or seek review of the fully favorable findings of the Administrative Law Judge. Accordingly, I find and conclude the Social Security Administrative Law Judge's Decision may be admitted into evidence to establish the procedural history of the case, but it may not be given any evidentiary weight with respect to the merits of the instant claim.

Accordingly, Claimant is entitled to temporary total disability benefits from June 17, 1998 to December 11, 1999, when he reached maximum medical improvement, based on his average weekly wage of $677.13 and to permanent partial disability benefits from December 12, 1999 to February 8, 2004, when Employer/Carrier established suitable alternative employment, based on the same average weekly wage. On February 9, 2004, Claimant became permanently partially disabled.

Since Claimant's only work injury which resulted in permanent restrictions was to his right knee, a body part covered by the schedule, 33 U.S.C. § 908(c)(1)-(20), the schedule is the exclusive remedy for permanent partial disability to body parts listed therein, and benefits paid pursuant to the schedule fully compensate claimants for their permanent partial disabilities, as those payments presume a loss in wage-earning capacity. Potomac Electric Power Co. v. Director, OWCP [PEPCO], supra; Porter v. Newport News Shipbuilding and Dry Dock Company, 36 BRBS 113, 118 (2002). Therefore, as Claimant's injury falls under the schedule, he is precluded from receiving permanent partial disability benefits for a wage loss pursuant to Section 8(c)(21) of the Act.

On June 17, 2003, Dr. Flores assigned a 4% permanent impairment rating to Claimant's right knee pursuant to Counsel for Claimant's letter-query of April 24, 2003. (EX-9, exhs. 2-3). Treating and consultative physicians have otherwise opined that no impairment rating should be assigned under the AMA Guides for Claimant's right knee and bursa surgical procedure.

Under Section 8(c)(2) and (19), the loss of use of a knee entitles Claimant to 11.52 weeks (4% x 288 weeks = 11.52 weeks) of compensation for permanent partial disability, based on his average weekly wage of $677.13 and a compensation rate of $451.44 ($677.13 x .6667) for a total of $5,200.59. 33 U.S.C. § 908(c)(2). Claimant's lump sum permanent partial compensation payment should be paid effective February 9, 2004.

I. Counsel for Claimant's Attorney's Fee

In view of the foregoing discussion and findings, I conclude that Counsel for Claimant has been unsuccessful in this remand proceeding and that his fee award should be further reduced by 75% of the fees requested.

Claimant was unable to establish that he is entitled to medical treatment for his low back pain and ongoing permanent total disability benefits which were previously awarded because of Employer/Carrier's initial failure to show suitable alternative employment. Since Employer/Carrier was successful in establishing suitable alternative employment in this remand matter, Claimant is precluded from receiving ongoing permanent partial benefits based on a loss of wage-earning capacity and is therefore relegated to the schedule and its payments.

Thus, Counsel for Claimant's fee award must be tailored to conform to Claimant's degree of success relative to the scope of the litigation as a whole. In sum, Claimant has shown he suffered a scheduled right knee injury, a temporary mid-back injury and a temporary psychological injury which produced no restrictions. Counsel was previously awarded a fee based on a finding that Claimant was permanently totally disabled which has been modified by this Decision on Remand. Accordingly, Counsel's fee should be further reduced from 50% of his requested fee hours to 25%, which is reasonably commensurate with his success in this matter. I so find and conclude.

III. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by

reference this statute and provides for its specific administrative application by the District Director.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 17, 1998 to December 11, 1999, based on Claimant's average weekly wage of $677.13, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from December 12, 1999 to February 8, 2004, based on Claimant's average weekly wage of $677.13, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant the sum of $5,200.59 as compensation for the scheduled permanent partial disability to Claimant's right knee based on Claimant's average weekly wage of $677.13 for 11.52 weeks in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(2) and (19).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2000, for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's June 16. 1998 work injury to his right knee, his August 17, 1999 work injury to his mid-back and his psychological condition found to be, in part, work-related, including the trigger point injections administered by Dr. Jackson for Claimant's mid-back work hardening injury, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

ORDERED this 28th day of November, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge